FILE COPY

Office Supre
F I
MAY
CHARLES E

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. [redacted] 53

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

-vs-

SUNBURST OIL & REFINING COMPANY, and JOHN H. HAMILTON, Receiver of Sunburst Oil & Refining Company,
Respondents.

BRIEF OF RESPONDENTS IN RESISTANCE OF PETITION FOR WRIT OF CERTIORARI

GEORGE E. HURD,
Great Falls, Montana,
Attorney for Respondents.

(36,727)

INDEX

SUBJECT INDEX

		Page
I.	Analysis of Petitioner's Theory	1
II.	Jurisdiction	3
III.	By the Decision Petitioner Was Not Deprived of Its Property without Due Process of Law	4
IV.	The Decision Is Not Within the Inhibition of Article I, Section 10, of the Constitution of the United States	7
V.	Corollaries to Main Question	11
VI.	Conclusion	12

CASES CITED

	Page
Bacon v. Texas, 163 U. S. 207, 41 L. Ed. 132	7, 10
Bergemann v. Backer, 157 U. S. 655, 39 L. Ed. 845	5
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107	5, 6
Castillo v. McConnico, 168 U. S. 674, 42 L. Ed. 622	7
Central Land Co. v. Laidley, 159 U. S. 103, 40 L. Ed. 91	5, 8
Columbia Ry. G. & E. Co. v. South Carolina, 261 U. S. 236, 67 L. Ed. 629	8
Corrigan v. Brickley, 271 U. S. 323, 70 L. Ed. 969	5
Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 56 L. Ed. 924	10
Doney v. Northern Pacific Railway Co., 60 Mont. 209, 199 Pac. 432	2, 8
Enterprise Irr. Dist. v. Farmers Mutual Canal Co., 243 U. S. 157, 61 L. Ed. 644	7
Fleming v. Fleming, 264 U. S. 29, 68 L. Ed. 547	1, 4, 8, 9, 10
Head v. Amoskeag Mfg. Co., 113 U. S. 9, 28 L. Ed. 889	5
Jones v. Buffalo Creek C. & C. Co., 245 U. S. 328, 62 L. Ed. 325	5
King Mfg. Co. v. Augusta, 277 U. S. 100, 72 L. Ed. 801	4
Kryger v. Wilson, 242 U. S. 171, 61 L. Ed. 229	9
Live Oak Water Users' Ass'n v. Railroad Commission, 269 U. S. 354, 70 L. Ed. 305	4
Long Sault Dev. Co. v. Call, 242 U. S. 272, 61 L. Ed. 294	10
Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162, 36 L. Ed. 925	5

CASES CITED—(Continued)

	Page
Moore-Mansfield Const. Co. v. Elec. Inst. Co., 234 U. S. 619, 58 L. Ed. 1503	6
Montana Horse Products Co. v. Great Northern Ry. Co., 7 Pac. (2d) 919	8
New Orleans Waterworks Co. v. Louisiana Sugar Ref'g Co., 125 U. S. 18, 31 L. Ed. 607	8
St. Paul M. & M. R. Co. v. County of Todd, 142 U S. 282, 35 L. Ed. 1014	8
Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 Pac. (2d) 927	2
Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382	1, 4, 5, 7
Turner v. Board of Commissioners, 173 U. S. 461, 43 L. Ed. 768	10
Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678	5
Western Union Tel. Co. v. Georgia, 269 U. S. 67, 70 L. Ed. 166	4

CONSTITUTIONAL PROVISIONS CITED

	Page
Amendment 14, Constitution of the United States	3
Article I, Section 10, Constitution of the United States	3, 7, 9, 11
Article XV, Sections 7 and 9, Constitution of Montana	8

STATUTES CITED

	Page
Act of February 13, 1925, U. S. C. A., Title 28, Section 344	2, 12
Section 7851, Revised Codes of Montana, 1921	8
Railroad Commission Act, Chapter 257 Revised Codes of Montana, 1921	3, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 913

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

-vs-

SUNBURST OIL & REFINING COMPANY, and JOHN H. HAMILTON, Receiver of Sunburst Oil & Refining Company,
Respondents.

BRIEF OF RESPONDENTS

I

ANALYSIS OF PETITIONER'S THEORY

Notwithstanding the decisions of this court in Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382, and Fleming v. Fleming, 264 U. S. 29, 68 L. Ed. 547, and many other cases, which appear to be conclusive against Petitioner's argument, Petitioner insists that this record presents some federal question not heretofore determined by this court.

Briefly, the record and Petitioner's brief disclose:

1. That in Doney v. Northern Pacific Railway Company, 60 Mont. 209, 199 Pac. 432, the Supreme Court of Montana, construing the same state statutes which it construed in this case (7 Pac. [2d] 927), held that before a shipper can recover in the courts damages for excess rates or discriminations, the discrimination or unreasonableness of the rate must first be passed upon by the Railroad Commission and the fact that the Railroad Commission was not authorized to order reparation does not prevent a shipper, after the rate has been so determined, from maintaining an action in court to recover the excess.
2. That in this case the same court held that the above mentioned doctrine of the Doney case was not the correct interpretation of the state statutes and overruled such decision to that extent.
3. That since the trial court, following the Doney case, rendered its judgment for the excess in favor of respondent, Sunburst Oil & Refining Company, such judgment should be and was affirmed on the doctrines of stare decisis and that the rule in the Doney case, which was in force when the shipper's contracts involved herein were made, became a part of such contracts.

The Petitioner contends that:

(a) This court has jurisdiction under the Act of

February 13th, 1925, U. S. C. Title 28, Section 344, to review the judgment of the Supreme Court of Montana.

(b) That the decision of the Supreme Court of Montana, by its interpretation of state statutes, Chapter 257 of the Revised Codes of Montana, 1921, enforces the state statutes so as to contravene:

(1) The due process clause of the Fourteenth Amendment to the Constitution of the United States.

(2) The provisions of Article I, Section 10, of the Constitution of the United States, which prohibits a State from passing any law which impairs the obligation of contracts.

It would seem that former decisions of this court have determined all of these questions against the Petitioner.

II

AS TO JURISDICTION

That the record herein does not present a case warranting this court in assuming jurisdiction to review, on the merits, the decision of the Supreme Court of Montana, seems to be clear.

It is not every claim of infraction of the due process of law clause of the Fourteenth Amendment to the

Constitution of the United States, or of Article I, section 10, thereof, which will invoke the jurisdiction of this court under paragraph (b), section 334, Title 28, U. S. C. A. as it now stands.

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Western Union Tel. Co. v. Georgia,
269 U. S. 67, 70 L. Ed. 166;

Live Oak Water Users Ass'n v. Railroad Commission,
269 U. S. 354, 70 L. Ed. 305;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

King Mfg. Co. v. Augusta,
277 U. S. 100, 72 L. Ed. 801.

In these cases, as well as in many others, the writ was dismissed for want of jurisdiction even after the cases were argued and submitted.

It is urged, therefore, that the record here does not present a case within the jurisdiction of this court to review on the merits.

III

BY THE DECISION PETITIONER WAS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW

At the hearing before the Board of Railroad Commissioners at which the rate charged was declared excessive and unreasonable, the Petitioner was present. One of its present counsel, Mr. J. P. Plunkett, its

general attorney, participated therein (R. p. 11). He, with Mr. R. J. Hagman and Mr. W. L. Clift, appeared for Petitioner in the trial court (R. p. 5) and in the Supreme Court of Montana (R. pp. 24-38).

The parties hereto were fully heard in the state courts in the regular course of judicial proceedings. The mere fact that the supreme court of Montana overruled its former decision in the Doney case, even though the Petitioner was prejudiced thereby, does not take away its property without due process of law.

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Walker v. Sauvinet,
92 U. S. 90, 23 L. Ed. 678;

Head v. Amoskeag Mfg. Co.,
113 U. S. 9, 28 L. Ed. 889;

Bergemann v. Backer,
157 U. S. 655, 39 L. Ed. 845;

Morley v. Lake Shore & M. S. R. Co.,
146 U. S. 162, 36 L. Ed. 925;

Jones v. Buffalo Creek C. & C. Co.,
245 U. S. 328, 62 L. Ed. 325;

Corrigan v. Buckley,
271 U. S. 323, 70 L. Ed. 969;

Brinkerhoff-Faris Trust & Sav. Co., v. Hill,
281 U. S. 673, 74 L. Ed. 1107.

In the last cited case, this court said:

"But our decision in the case at bar is not based on the ground that there has been a retrospective

denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Land & Improv. Co. Case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Land & Improv. Co. Case. Neither of these matters raises a federal question; neither is subject to our review."

The Montana Supreme Court had the power to construe the statutes dealing with the Railroad Commission. It had the power to re-examine and overrule the Doney case. Neither of those matters raises a federal question; neither is subject to review by this court.

Brinkerhoff-Faris Trust & Sav. Co., v. Hill, 281 U. S. 673, 74 L. Ed. 1107;

Moore-Mansfield Constr. Co. v. Elec. Inst. Co., 234 U. S. 619, 58 L. Ed. 1503;

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132.

Petitioner concedes that the state statutes are valid. It concedes that the Doney case and this case involve only the construction placed upon the statutes by the Supreme Court. It concedes that neither interpretation deprived it of a remedy. Its complaint is that although it enjoyed the remedy, the result was not in its favor.

That being true, this record presents no federal question as to due process.

Enterprise Irr. Dist. v. Farmer's Mutual Canal Co.,
243 U. S. 157, 61 L. Ed. 644;

Castillo v. McConnico,
168 U. S. 674, 42 L. Ed. 622.

IV

THE DECISION IS NOT WITHIN THE INHIBITION OF ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES

Article I, section 10, of the Constitution of the United States provides:

"No State * * * shall * * * pass any * * * law impairing the obligation of contracts * * *."

By a long line of decisions this Court has held that this constitutional provision is directed only against impairment by legislation, and not by judgments of courts.

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.,
125 U. S. 18, 31 L. Ed. 607;

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

St. Paul M. & M. R. Co. v. County of Todd,
142 U. S. 282, 35 L. Ed. 1014;

Columbia Ry. G. & E. Co. v. South Carolina,
261 U. S. 236, 67 L. Ed. 629.

In effect, the situation is that under the rule announced in the Doney case a shipper, by an action in court, could recover for excess freight charges paid a carrier, after the Railroad Commission, without authority to award reparations, had determined that a rate was excessive.

The organic and statutory law of Montana allows a carrier only reasonable compensation, and no more, for the service rendered.

Article XV, sections 7 and 9, Constitution of Montana;
Section 7851, Revised Codes of Montana, 1921.

The Railroad Commission Act deprived the shipper of the common law remedy theretofore allowed him.

Montana Horse Products Co. v. Great Northern Railway Co.,
7 Pac. (2d) 919;

Doney v. Northern Pacific Railway Co.,
60 Mont. 209, 199 Pac. 432.

When the contracts involved herein were made, both

the shipper and carrier knew that if the rates charged were subsequently determined to be excessive the shipper had his statutory remedy to recover the excess from the carrier. The interpretation of the state statutes became a part of the contract.

The decision in this case is to the effect that the shipper, even though the amount charged is excessive, cannot recover such excess where it arose out of a tariff regularly promulgated by the Railroad Commission. In other words, the Supreme Court of Montana held that herein the shipper pursued the wrong remedy, but since the right result was reached, to-wit: that the carrier had improperly come into possession of money which it should not have taken from the shipper, the shipper was entitled to have the money refunded.

Upon the maxim, for every wrong there is a remedy, the decision can be upheld. It is impossible to discover herein any violation of Article I, Section 10, of the Constitution of the United States.

A change of judicial decision as to the construction of a state statute does not render the changed construction an impairment of contract obligations entered into on the faith of the prior construction a legislative change within the prohibition of Article I, Section 10, of the Constitution of the United States.

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

Kryger v. Wilson,
242 U. S. 171, 61 L. Ed. 229;

Long Sault Dev. Co. v. Call,
242 U. S. 272, 61 L. Ed. 294;

Cross Lake Shooting & Fishing Club v. Louisiana,
224 U. S. 632, 56 L. Ed. 924;

Turner v. Board of Commissioners,
173 U. S. 461, 43 L. Ed. 768;

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132.

In Fleming v. Fleming, 264 U. S. 29, 68 L. Ed. 547 this court said:

"It is urged upon us that the impairment here is legislative, in that the case turned on the effect of § 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute, and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with

the many decisions of this court cited in the Flanagan Case.

"For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial Federal question, and dismiss the writ of error for lack of jurisdiction."

Clearly, Article I, section 10, was not violated by the decision in the Doney case, or in this case.

V

COROLLARIES TO MAIN QUESTIONS

Petioner urges two corollaries to its principal propositions.

1. That the construction given by the Supreme Court of Montana to the state statutes must be determined by its judgment in the case and not by its statements in the opinion.
2. That respondent had no vested right in the construction of the state statutes in the Doney case that should be protected by the doctrine of stare decisis.

These corollaries do not appear to have any bearing on the questions here for consideration. In our argument upon the questions above discussed, we believe that we have given full effect to these obviously immaterial propositions. In any event, they afford no grounds for certiorari and do not reflect any light on the questions of due process of law, or impairment of obligations of contract, in so far as those questions are involved in this proceeding.

VI

CONCLUSION

From the foregoing, it seems clear that the following propositions have been established:

1. That the case presented by the Petitioner is not one within the provisions of paragraph (b) of section 344, Title 28, U. S. C. A. and this court should not assume jurisdiction thereof for the purpose of reviewing the decision of the Supreme Court of Montana.
2. That by its former decisions this Court has heretofore determined all the questions presented by this record adversely to the Petitioner's contentions.
3. That the state statutes, as construed by the Supreme Court of Montana, did not deprive Petitioner of its property without due process of law, or violate the provisions of the Constitution of the United States against State legislation impairing the obligation of contracts.
4. That the record presents no substantial federal question.

We respectfully urge, therefore, that Petitioner's petition for writ of certiorari be denied.

Respectfully submitted,
GEORGE E. HURD,
Attorney for Respondents.